Supreme Court, U. S.
FILED
DEC 2 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-631

DOUGLAS M. COSTLE, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, and GEORGE R. ALEXANDER, JR., REGIONAL ADMINISTRATOR,
Petitioners,
v.
REPUBLIC STEEL CORPORATION, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT REPUBLIC STEEL CORPORATION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court below (Pet. App. 1a-16a) is reported at 557 F.2d 91. The action of the Environmental Protection Agency (Pet. App. 19a-23a) reviewed by the court below is not reported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1970).

QUESTION PRESENTED

Can the Environmental Protection Agency disapprove issuance by a state of a discharge permit requiring achievement of permit-established effluent limitations within the shortest practical time after the determination of those limitations, on the ground that they will not be achieved by July 1, 1977, where –

(1) The EPA Administrator has not defined what effluent limitations are to be achieved by July 1, 1977;

(2) The pollution-control facilities necessary to achieve the limitations in the permit cannot be completed by July 1, 1977; and

(3) The limitations in the permit were determined after December 31, 1974?

STATUTES INVOLVED

The pertinent portions of Sections 101, 301, 304, 306, 402 and 510 of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816, 844, 850, 854, 880, and 893, as amended, are set out in the Appendix, *infra*.[1]

STATEMENT

1. The Statutory Framework.

The Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 33 U.S.C. § 1251 *et seq.* (Supp. V 1975), establish the National Pollutant Discharge Elimination System (NPDES) for the purpose of issuing permits to persons discharging pollutants from point

[1] The 1972 Amendments are referred to as they appear in Public Law 92-500. Parallel citations to sections of Public Law 92-500 and sections of the United States Code appear in the Table of Statutes, *supra*.

sources into the waters of the United States. The authority to issue NPDES permits in any state rests either with the Administrator of the United States Environmental Protection Agency (Section 402(a)), or with that state, if it desires to administer its own permit program and has submitted to the Administrator a program which meets the Act's criteria (Section 402(b)). Ohio is one of the states having an approved permit program and issuing state NPDES permits.

Although Ohio has the primary authority and responsibility to reduce pollution within its boundaries (Sections 101(b) and 510), and to prepare and issue NPDES permits (Section 402(b)), it cannot issue a permit if the Administrator objects to the proposed permit "as being outside the guidelines and requirements of [the] Act" (Section 402(d)(2)(B)).[2]

Section 301(b) provides that existing point source dischargers will be required to achieve two levels of technology-based effluent limitations. The first level to be achieved by dischargers in the private sector is stated in Section 301(b)(1)(A):

> . . . there shall be achieved –
>
> (1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available *as defined by the Administrator pursuant to section 304(b) of this Act* . . . . (emphasis added)

As the italicized language suggests, the Act does not define the "best practicable control technology currently

[2] The Administrator may waive this authority to disapprove with respect to any point source or category, class, type, or size of point sources for any individual state or for all states (Section 402(d)(3), (e), (f)).

available" (BPT) effluent limitations which a discharger must achieve; instead, the Act provides for a sequence of administrative actions to be taken in order to establish these effluent limitations.

The Act requires the Administrator to publish by October 13, 1973, "regulations, providing guidelines for effluent limitations" for 27 industries, including iron and steel manufacturing (Sections 304(b) and 306 (b)(1)(A)). *Natural Resources Defense Council, Inc. v. Train,* 166 U.S. App. D.C. 312, 324, 510 F.2d 692, 704 (1974). The Section 304(b) guidelines are to survey the practicable pollution-control technology for each industry, to assess the effectiveness of such technology, and to describe the methodology for promulgation of BPT effluent limitations. *E. I. du Pont de Nemours & Co. v. Train,* 430 U.S. 112, 131 (1977). The Act requires that BPT effluent limitations "are to be adopted by the Administrator, that they are to be based primarily on classes and categories, and that they are to take the form of regulations." *E. I. du Pont de Nemours & Co. v. Train, ibid.* at 129.

The Act also provides for the implementation of the requirements of Section 301(b)(1)(A) through the issuance of NPDES permits to individual dischargers. All dischargers were to be issued their initial NPDES permits no later than December 31, 1974. *Natural Resources Defense Council, Inc. v. Train,* 166 U.S. App. D.C. 312, 327, 510 F.2d 692, 707 (1974). These permits are " 'to transform generally applicable effluent limitations . . . into the obligations (including a timetable for compliance) of the individual discharger[s] . . . .' *EPA v. State Water Resources Control Board,* 426 U.S. 200, 205." *E. I. du Pont de Nemours & Co. v. Train,* 430 U.S. 112, 119-20 (1977).

2. The Proceedings Below.

On July 31, 1972, Republic Steel Corporation applied under Section 13 of the Rivers and Harbors Act of 1899,

33 U.S.C. § 407 (1970), for a permit to discharge pollutants from its Canton, Ohio, steel plant into Nimishillen Creek. This application was still pending on October 18, 1972, when the Federal Water Pollution Control Act Amendments of 1972 were enacted. Under the provisions of the Act this application was deemed to be an application to the Administrator for a permit under the newly created National Pollutant Discharge Elimination System (Section 402(a)(5)).

From October 18, 1972, until March 11, 1974, the Administrator had the authority to issue a federal NPDES permit for the Canton plant even though no regulations defining BPT for the facilities at that plant had been promulgated, since the Administrator has authority under Section 402(a)(1) to issue a federal NPDES permit "prior to the taking of necessary implementing actions relating to [BPT] requirements, [upon] such conditions as the Administrator determines are necessary to carry out the provisions of this Act." However, the Administrator did not do so. His authority to issue an NPDES permit for the Canton plant under Section 402(a)(1) ended on March 11, 1974, when he approved Ohio's program for issuing NPDES permits (Section 402(c)(1)). 39 Fed. Reg. 26061 (July 16, 1974). Since then Ohio has had the authority to issue permits under Section 402(b).

On June 10, 1974, the Director of the Ohio Environmental Protection Agency, who administers the Ohio NPDES program, issued a draft NPDES permit for the Canton plant (A. 1a-20a).[3] This draft permit established "interim" effluent limitations that were to be achieved by September 6, 1974, "final" effluent limitations that were to be achieved 24 months later, and a schedule of compliance for designing, constructing, and placing into opera-

[3] A copy of the appendix in the court below has been lodged by the petitioner with the Clerk of this Court. "A." designates references to that appendix.

tion the treatment facilities for achieving the final limitations. The draft permit did not specify what treatment facilities were to be built by Republic.

Although this draft permit was issued well after the October 18, 1973, deadline for EPA promulgation of regulations defining BPT for the steel industry, this permit was prepared without the benefit of any EPA effluent regulations or guidelines. BPT effluent guideline limitation regulations applicable to this plant, which primarily produces alloy and stainless steel (A. 45a, 127a), were not promulgated until March 15, 1976.[4] 41 Fed. Reg. 12990 (Mar. 29, 1976). These regulations were initially promulgated as "interim final" regulations, and they have since been vacated and remanded. *American Iron & Steel Institute v. EPA*, No. 76-1386 (CA3 Sept. 14, 1977). Consequently, the Administrator has still not defined the meaning of "best practicable control technology currently available" for the segment of the steel industry which includes the Canton plant.

Republic had objections to several provisions in this draft permit and exercised its right to file a request for an adjudication hearing before the Ohio EPA pursuant to Ohio Revised Code Chapters 119, 3745, and 6111, and Ohio EPA Regulations. This draft permit never became effective under the provisions of the Ohio NPDES permit program. Ohio Revised Code Section 3745.07 (Page Supp. 1976); Ohio Administrative Code Section 3745-47-05.

Republic and the Ohio EPA then engaged in extensive negotiations which ultimately resolved all but one of Republic's objections. As a result of these negotiations, the

[4] These alloy and stainless steel regulations (also referred to as "specialty steel" regulations) simultaneously established Section 304 guidelines and Section 301 effluent limitations. This deviation from the statutory sequence has been approved if "the purposes for issuing the guidelines were substantially achieved . . . and no prejudice has been shown." *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 131-32 n.22 (1977).

permit was changed substantially, including changes in the interim and final effluent limitations. Agreement on the final effluent limitations and all other terms except the time for compliance with the final limitations was reached on August 1, 1975. Despite the fact that a final permit could not then be issued, Republic agreed to proceed with the installation of the pollution-control facilities necessary to achieve the final limitations and agreed that August 1, 1975, would be the starting date for whatever schedule of compliance might ultimately be determined (A. 43a-44a).[5]

Because Republic and the Ohio EPA were unable to agree on the date for achieving the final effluent limitations, an adjudication hearing was held on August 21 and 22 and September 2, 1975, to resolve this issue. The draft permit prepared by the Ohio EPA had provided for compliance with all final effluent limitations within 24 months after the effective date of the permit, but Republic contended it could not comply by September 6, 1976, or even by July 1, 1977, except with respect to one outfall.

The evidence presented at the hearing clearly established that completion of treatment facilities would take 41 months (until January 1, 1979) for one outfall (A. 126a-127a) and 37 months (until September 1, 1978) for another outfall (A. 125a). The evidence also established that each treatment facility and its principal components had to be custom-designed and that detailed engineering could not commence until the final effluent limitations to be achieved were determined, which was not until August 1, 1975 (A. 51a, 83a-84a, 129a-130a).

After the hearing, the Ohio EPA on January 5, 1976, submitted to EPA Region V a proposed permit containing the modified final effluent limitations and the compliance schedules supported by the hearing record (A. 137a-159a). The Ohio EPA letter of transmittal stated (A. 158a):

[5] The agreements reached between Republic and the Ohio EPA are contained in A. 21a-39a.

> You will note that the schedule of compliance (See Page 11 of 19) extends beyond July 1, 1977. It is the judgment of the Ohio EPA that the evidence adduced at the hearing together with the affidavit of J. Leonard Hough justify this schedule. Furthermore, it is the opinion of the Environmental Law Section of the Attorney General's Office that the date established by P.L. 92-500 for meeting best practicable technology (BPT) effluent limitations, to wit, July 1, 1977, is not a bar to extending the schedule beyond that date, at least not in an instance – and the present case is such – where no final federal effluent guidelines have been promulgated.

After reviewing the material submitted by the Ohio EPA, including the adjudication hearing record, the EPA by letter of March 30, 1976, disapproved the issuance of the proposed permit (Pet. App. 19a-23a). Although the EPA did not question the reasonableness of the schedule of compliance, it determined that "the stipulation and proposed permit for Republic Steel Corporation, Canton, Ohio facility, would violate Section 301 of the FWPCA in that the Schedule of Compliance for BPT extends beyond July 1, 1977, and for that reason, Region V, USEPA, objects to the issuance of said permit." Pet. App. 21a.

Despite the EPA's disapproval, Republic continued to build the treatment facilities needed to achieve the final effluent limitations in this permit. In fact, this work has proceeded since August 1, 1975, without interruption and according to the schedules in the proposed permit.

Republic petitioned the United States Court of Appeals for the Sixth Circuit for review of the EPA's action which denied the issuance of an NPDES permit (Section 509(b)).[6] In the Court of Appeals both Republic

[6] Subsequent to the filing of this petition for review, the EPA on June 3, 1976, adopted its Enforcement Compliance Schedule Letter ("ECSL") policy. *See* Pet. 17. An ECSL has never been offered to Republic for the Canton plant, and under the terms of this policy the Canton plant is not eligible for an ECSL.

and the Ohio EPA argued that the permit did not violate Section 301 and was unlawfully disapproved. The Court of Appeals held that the permit did not violate Section 301 and that the Administrator's disapproval was unlawful. The Court of Appeals remanded the case to the EPA to allow the agency another opportunity to review the permit and consider whether the inherent reasonableness of the proposed compliance schedules "is amenable to administrative review under existing regulations or sections other than 301." Pet. App. 15a-16a. The Court of Appeals also directed the EPA to allow the permit to issue unless the Administrator specified within 30 days "persuasive new grounds for objection under section 402(d)(2)(B)." (Pet. App. 16a).

The EPA has chosen not to follow the expeditious remand procedure outlined by the Court of Appeals. Instead, subsequent to the obtaining of stays of the mandate from the Court of Appeals and extensions of time from this Court, the Administrator filed a petition for writ of certiorari with this Court on October 31, 1977.

ARGUMENT

1. The decision below is narrow, and has limited applicability.

The decision below has very limited applicability. It involves a narrow factual situation – its holding that Section 301(b)(1)(A) does not authorize the Administrator to disapprove a state NPDES permit providing for the attainment of permit-established effluent limitations after July 1, 1977, is applicable only where all of the following facts exist:

> (1) BPT has not been "defined by the Administrator pursuant to section 304(b)";
>
> (2) the state permit is issued after December 31, 1974; and

> (3) the state has determined that treatment facilities necessary to achieve the effluent limitations in the permit cannot be completed by July 1, 1977.

July 1, 1977, is now passed, and this combination of facts can only exist in a relatively few instances at most.

The petition asserts that the decision below "inevitably calls into question the enforceability of the July 1, 1977, deadline for all permits" (Pet. 10). But the decision does not deal with the enforcement of permits. It addresses only the Administrator's power to object to a state permit and, has no direct application to actions brought to enforce the terms of final permits. No reason exists – and none is given in the petition – why all other dischargers may now ignore Section 301(a) and cease complying or attempting to comply with the BPT limitations in their permits. The petition contends that dischargers which have received permits after December 31, 1974, "undoubtedly will contend that it is unfair to enforce the July 1, 1977, deadline against them but not against Republic" (Pet. 10). There is nothing unfair in requiring any discharger, regardless of when its permit was issued, to achieve BPT limitations by July 1, 1977, if those limitations can be achieved by then. The court below limited its decision by expressly stating that its decision "is intended to relieve the discharger of the unfair consequences flowing from EPA's administrative shortcomings." Pet. App. 15a. Relief was given Republic because it was impossible to complete the treatment facilities by July 1, 1977, since Republic was unable to design those facilities until final effluent limitations were determined on August 1, 1975.

The claim in the petition that this decision will have "widespread consequences" (Pet. 10) is unwarranted. The petition fails to cite any litigation generated or affected by this decision, and widespread litigation cannot be presumed merely from the assertion (Pet. 10) that more than 472 permits have been issued without guidelines since

December 31, 1974. There is no reason to believe that these dischargers are not now meeting the July 1, 1977, limitations set by their permits.[7] Furthermore, unless these dischargers have elected to challenge the compliance schedules in their permits, they seemingly are now foreclosed from raising such challenges (Section 509(a), (b)). *Cf. United States v. Adamo Wrecking Co.*, 545 F.2d 1 (CA6 1976), *cert. granted*, 430 U.S. 953 (1977).

2. There is no conflict of decisions.

The court below expressly disclaimed any conflict. It considered the possibility of a conflict between its decision and the cases cited in the petition and concluded that these cases did not involve the same facts and did not present a conflict.

The court below distinguished *Bethlehem Steel Corporation v. Train*, 544 F.2d 657 (CA3), *certiorari denied sub. nom. Bethlehem Steel Corporation v. Quarles*, 430 U.S. 975 (1977), and *United States Steel Corporation v. Train*, 556 F.2d 822 (CA7 1977), on two grounds. First, as a factual matter, in both cases the dischargers had at least the statutory minimum of 30 months in which to comply. And second, both cases arose from the issuance of *federal* NPDES permits under Section 402(a), and therefore the extent of the Administrator's authority to disapprove state permits under Section 402(d)(2)(B) was not in issue.

In finding that *Bethlehem Steel* was distinguishable because it involved a permit issued by December 31, 1974, the court below noted that the Third Circuit had also anticipated this very distinction. It said (Pet. App. 12a-13a):

---

[7] Installation of treatment facilities at steel plants generally takes longer than their installation elsewhere, since the treatment facilities for steel plants tend to be relatively larger and more complex, and thus more difficult to design, construct, and place into operation.

> . . . Bethlehem Steel enjoyed a 30 month compliance schedule, the minimum period possible under the statutory scheme assuming no administrative slippage. In contrast, Republic's permit was issued by a state agency eight months after expiration of the permit granting deadline, affording Republic only 24 months for compliance. This factual difference was not overlooked by the Third Circuit which carefully excludes Republic's situation from the purview of its holding in the *Bethlehem Steel* case. [citing 544 F.2d at 660, n.20].

The petition argues that this distinction "appears to be based on an incorrect belief that December 31, 1974, was the last date for issuance of permits" (Pet. 8-9). This suggestion is unfounded. *See* Pet. App. 4a, n.6. To the contrary, this distinction is soundly based upon the statutory framework for establishing and achieving BPT, as summarized by language from a District of Columbia Court of Appeals opinion which the court below cited with approval (Pet. App. 8a-9a):

> The Act's text and its legislative history make clear that as a general matter the section 304(b)(1) guidelines and the section 301(b)(1) limitations were to be developed prior to the issuance of permits. Sections 402(a) and 402(b) require that permits issued by the Administrator and by the states assure compliance with the effluent limitations of section 301. The Senate Report confirms the interdependence of the three provisions. That report states that "[s]ubsection (b) of this section [304] requires the Administrator, within one year after enactment, to publish guidelines for setting effluent limitations reflecting the mandate of section 301, which will be imposed as conditions of permits issued under section 402." Another portion of the Senate Report indicates that at least 30 months lead time is required to afford industries an opportunity to complete construction and modifications necessary to comply with the phase one effluent limitation deadline. Under the final version of the Act, effluent limitations and permits would be required by December 31, 1974, in order to provide polluters 30 months to comply with the July 1, 1977, deadline. *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 707-708 (D.C. Cir. 1975) (footnotes omitted).

The court below likewise distinguished *United States Steel Corporation v. Train*, 556 F.2d 822 (CA7 1977), on the ground that the discharger there also had at least a 30-month compliance period. Pet. App. 13a, n.16. The petition contends (Pet. 11) that this distinction cannot be made because "[t]he permit initially issued to United States Steel in 1974, like that issued to Republic in 1974, was subject to further administrative consideration." Examination of the Seventh Circuit's decision, however, shows that the result and effect of the "further administrative consideration" of United States Steel's permit involved there are substantially different from what occurred in this case.

Unlike Republic's permit, the permit issued to United States Steel was not materially changed during administrative and judicial review proceedings. *See* 556 F.2d at 843-47. Moreover, the permit provision requiring United States Steel to install a recycling system on a blast furnace in order to achieve BPT was based upon applicable BPT effluent guideline limitation regulations promulgated by the Administrator. 556 F.2d at 843. Concluding that United States Steel's challenge to this provision constituted a request for a variance from the applicable BPT guidelines (556 F.2d at 844), and finding that "[t]here was time to install a recycling system between October 31, 1974, when the permit first issued and July 1, 1977 . . ." (556 F.2d at 847), the Seventh Circuit held that the duration of the litigation unsuccessfully pursued by United States Steel did not excuse it from installing a recycling system by July 1, 1977 (556 F.2d at 847). In so holding, the Seventh Circuit relied upon the following statement in *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 92 (1975):

> [A] polluter is subject to existing requirements until such time as he obtains a variance, and variances are not available under the revision authority until they have been approved by both the State and the Agency. Should either entity determine that granting the variance would prevent attainment or maintenance of national air standards, the polluter is presumably within his rights in seeking judicial review. This litigation, however, is carried out on the polluter's time, not the public's, for during its pendency the original regulations remain in effect, and the polluter's failure to comply may subject him to a variety of enforcement procedures.

This statement and the reasoning of the Seventh Circuit cannot be applied to the facts here. Unlike *United States Steel*, the administrative proceeding instituted by Republic resulted in substantial changes in the permit's effluent limitations and schedules of compliance, and Republic did not have time to install the necessary treatment facilities between the determination of the final limitations and July 1, 1977. Moreover, Republic was not seeking a variance from existing BPT guidelines, because the Administrator had promulgated no guidelines covering its discharges.

The court below also distinguished *Bethlehem Steel* and, at least by implication, *United States Steel* on the ground that they involved the Administrator's authority to issue federal permits rather than his authority to disapprove state permits. Pet. App. 13a-14a. In issuing federal permits, the Administrator's authority is broad. *See* Section 402(a)(1). In reviewing state permits his authority under Section 402(d)(2)(B) is limited, since he can disapprove a state permit only if it is "outside of the guidelines and requirements of [the] Act." The petition makes several strained arguments in an attempt to discredit this distinction (Pet. 14, n.12), but all are irrelevant. None of these

arguments relate to the authority of the Administrator to disapprove a state permit.

In order to bolster the claim that a conflict exists, the petition argues (Pet. 12, n.9) that the decision below "conflicts in principle" with *State Water Control Board v. Train*, 559 F.2d 921 (CA4 1977), and *Natural Resources Defense Council, Inc. v. Train*, 166 U.S. App. D.C. 312, 510 F.2d 692 (1974). Like their holdings, the principles invoked in these cases do not conflict with this case. *State Water Control Board* affirms a district court decision expressly distinguished in the opinion of the court below. Pet. App. 12a, n. 15. That case held that the July 1, 1977, deadline for municipalities is not unenforceable because federal funding had been unlawfully withheld. The Fourth Circuit found no link between the obligation to install secondary treatment plants and the provision for funding in a separate title of the Act. By contrast, the court below found in this case that Section 301(b)(1)(A) itself linked the *achievement* of BPT with an administrative duty to *establish* BPT.

Nor is there a conflict in principle between the decision below and *Natural Resources Defense Council*, from which the court below quotes with approval (Pet. App. 8a-9a). Contrary to the implication in the petition, the District of Columbia Circuit does not suggest that a July 1, 1977, BPT deadline can be imposed in all permits, whenever issued; and the court below does not suggest that if a discharger has its BPT effluent limitations set by a permit issued without guidelines it cannot be required to meet those limitations by July 1, 1977.

In sum, there is clearly no direct conflict of decisions, nor is there anything that can fairly be called an argumentative conflict between the decision below and any other decision. No other case has considered the matters of fact and law involved here.

3. The court below correctly construed the statute and gave effect to all its terms.

The court below recognized that EPA's characterization of the July 1, 1977, BPT deadline as being "independent" and "inflexible" conflicts with the plain meaning of the statute and leads to absurd and inequitable results. The Act does not require, as the petition claims (Pet. 3), that "no permit may be issued that does not require the achievement of levels of effluent consistent with the best practicable control technology by July 1, 1977." What Section 301(b)(1)(A) says is that effluent limitations "shall be achieved . . . not later than July 1, 1977 . . . which shall require the application of the best practicable control technology currently available *as defined by the Administrator pursuant to section 304(b)*" (emphasis added). The italicized phrase cannot simply be written out of the statute by ignoring it. As the court below said (Pet. App. 8a), "The import of the section is unequivocal: federal regulations must exist before dischargers can be compelled to honor dates for implementing them."

The court below correctly recognized that the deadline for *establishing* limitations and the deadline for *achieving* limitations were linked. The unstated, inescapable conclusion flowing from EPA's truncated interpretation of the statute is that even if no administrative action had ever occurred, Republic would today be violating Section 301(b)(1)(A). Such a harsh, inequitable interpretation should not be given to an Act of Congress, and the court below properly refused to do so. *See* Pet. App. 13a, n.17.

4. The petition makes it plain that the case has no practical consequence worthy of this Court's time.

The petition expressly states that EPA is not contending "that polluters making good faith efforts to install the

best practicable technology must cease doing business if, for reasons beyond their control, they are unable to meet the [1977] deadline" (Pet. 17). EPA has never questioned Republic's good faith in this matter. Thus, the petition is not filed because EPA seeks any change in the scope, timing, or results of Republic's continuing pollution control efforts at the Canton plant.

What the petition seemingly seeks is to establish that dischargers who cannot complete treatment facilities by July 1, 1977, should nevertheless be threatened with prosecution at the discretion of the Administrator. But the Court below correctly held that there is no warrant for this result in this case. In this case, the default is the Administrator's, for he has not defined the best practicable control technology currently available as required by the statute. He should not be able to convert his failure into an added burden on the respondent. A further decision in this case will not affect the time of completion of appropriate pollution-control devices, and this Court need not spend its limited time in deciding such a narrow and limited issue whose sole practical consequence is the threat of prosecution.

Finally, reference should be made to the fact that the question presented in this case may be affected by pending legislation. Amendments to the Federal Water Pollution Control Act have been passed by both Houses of Congress, and it has been announced that conferees for both Houses have reached an agreement, which reportedly will be put before both Houses after the Thanksgiving recess. According to announcements, the amendments as agreed to by the conferees provide for extensions of the July 1, 1977, compliance date. We will advise the Court when the amendments have been finally acted upon by Congress.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

1. Section 101 of the Federal Water Pollution Control Act Amendments of 1972, Pub.L.No. 92-500, 86 Stat. 816, 33 U.S.C. 1251 (Supp. V 1975), provides in relevant part:

• • •

(b) It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

• • •

2. Section 301 of the Federal Water Pollution Control Act Amendments of 1972, Pub.L.No. 92-500, 86 Stat. 844, 33 U.S.C. 1311 (Supp. V 1975), provides in relevant part:

(a) Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful.

(b) In order to carry out the objective of this Act there shall be achieved —

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Act, or (ii) in the case

of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 307 of this Act;

• • •

3. Section 304 of the Federal Water Pollution Control Act Amendments of 1972, Pub.L.No. 92-500, 86 Stat. 850, 33 U.S.C. 1314 (Supp. V 1975), provides in relevant part:

• • •

(b) For the purpose of adopting or revising effluent limitations under this Act the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of enactment of this title, regulations, providing guidelines for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations. Such regulations shall —

(1)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the control measures and practices to be applicable to point sources (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best practicable control technology currently available to comply with subsection (b)(1) of section 301 of this Act shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate;

(2)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best control measures and practices achievable including treatment techniques, process and procedure innovations, operating methods, and other alternatives for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the best measures and practices available to comply with subsection (b)(2) of section 301 of this Act to be applicable to any point source (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate; and

(3) identify control measures and practices available to eliminate the discharge of pollutants from categories and classes of point sources, taking into account the cost of achieving such elimination of the discharge of pollutants.

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4. Section 306 of the Federal Water Pollution Control Act Amendments of 1972, Pub.L.No. 92-500, 86 Stat. 854, 33 U.S.C. 1342 (Supp. V 1975), provides in relevant part:

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(b)(1)(A) The Administrator shall, within ninety days after the date of enactment of this title publish (and from time to time thereafter shall revise) a list of categories of sources, which shall, at the minimum, include:

pulp and paper mills;
paperboard, builders paper and board mills;
meat product and rendering processing;
dairy product processing;
grain mills;
canned and preserved fruits and vegetables processing;
canned and preserved seafood processing;
sugar processing;
textile mills;
cement manufacturing;
feedlots;
electroplating;
organic chemicals manufacturing;
inorganic chemicals manufacturing;
plastic and synthetic materials manufacturing;
soap and detergent manufacturing;
fertilizer manufacturing;
petroleum refining;
iron and steel manufacturing;
nonferrous metals manufacturing;
phosphate manufacturing;
steam electric powerplants;
ferroalloy manufacturing;
leather tanning and finishing;
glass and asbestos manufacturing;
rubber processing; and
timber products processing.

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5. Section 402 of the Federal Water Pollution Control Act Amendments of 1972, Pub.L.No. 92-500, 86 Stat.

880, 33 U.S.C. 1342 (Supp. V 1975), provides in relevant part:

(a)(1) Except as provided in sections 318 and 404 of this Act, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a), upon condition that such discharge will meet either all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 13 of the Act of March 3, 1899, shall be deemed to be permits issued under this title, and permits issued under this title shall be deemed to be permits issued under section 13 of the Act of March 3, 1899, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this Act.

(5) No permit for a discharge into the navigable waters shall be issued under section 13 of the Act of March

3, 1899, after the date of enactment of this title. Each application for a permit under section 13 of the Act of March 3, 1899, pending on the date of enactment of this Act shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this Act, to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on the date of enactment of this Act and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 304 (h)(2) of this Act, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this Act. No such permit shall issue if the Administrator objects to such issuance.

(b) At any time after the promulgation of the guidelines required by subsection (h)(2) of section 304 of this Act, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described

program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which –

(A) apply, and insure compliance with, any applicable requirements of sections 301, 302, 306, 307, and 403;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 308 of this Act, or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 308 of this Act;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

* * *

(c)(1) Not later than ninety days after the date on which a State has submitted a program (or revision there-

of) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those navigable waters subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 304(h)(2) of this Act. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 304(h)(2) of this Act.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(d)(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed

permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this Act.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(e) In accordance with guidelines promulgated pursuant to subsection (h)(2) of section 304 of this Act, the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

(f) The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

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(k) Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 309 and 505, with sections 301, 302, 306, 307, and 403, except any standard imposed under section 307 for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 301, 306, or 402 of this Act, or (2) section 13 of the Act of March 3, 1899, unless the Administrator or other plaintiff proves that final administrative disposition of such appli-

cation has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on the date of enactment of the Federal Water Pollution Control Act Amendments of 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date of enactment which source is not subject to section 13 of the Act of March 3, 1899, the discharge by such source shall not be a violation of this Act if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

6. Section 510 of the Federal Water Pollution Control Act Amendments of 1972, Pub.L.No. 92-500, 86 Stat. 893, 33 U.S.C. 1369 (Supp. V 1975), provides:

Except as expressly provided in this Act, nothing in this Act shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this Act; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.